



Comptroller General
of the United States

Washington, D.C. 20548

145173

Decision

Matter of: American Dredging Company

File: B-244790

Date: October 29, 1991

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Starfield, Payne & Korn, for the protester.
Lester Edelman, Esq., and Beth A. Kelly, Esq., Department of
the Army, for the agency.
Behn Miller, and Ralph O. White, Esq., Office of the General
Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Procuring agency properly canceled an invitation for bids
after bid opening where the solicitation--whose award amount
was expected to exceed \$100,000--failed to include mandatory
requirement for Certificate of Procurement Integrity clause
and certificate form.

DECISION

American Dredging Company protests the cancellation, after
bid opening, of invitation for bids (IFB) No. DACW51-91-B-
0034, by the United States Army Corps of Engineers, New York
District, for maintenance dredging of the Tarrytown Harbor,
located in New York. American contends that the Army's
failure to include a Certificate of Procurement Integrity
form in the solicitation, and the resulting failure of the
bidders to include signed certificates with their bids, is
not a valid basis for canceling the IFB after bids have been
opened.

We dismiss the protest because it fails to state a valid
basis of protest. See 4 C.F.R. § 21.3(m) (1991).

The IFB, issued May 17, 1991, sought bids for the Tarrytown
Harbor dredging project by June 18. At bid opening, bids
were received from two contractors--American and Great Lakes
Dredging Company. When neither of the two contractors
provided procurement integrity certifications with their
bids, the contracting officer realized that the mandatory
procurement integrity provisions had been inadvertently
omitted from the solicitation. Thus, the contracting
officer canceled the IFB on June 28, and notified both
bidders, by undated letter, several days later. In his

letter, the contracting officer further advised that the dredging requirement would be resolicited in the near future.¹ On July 15, American--the apparent low bidder under the original IFB--filed this protest.

American contends that the Army improperly canceled the IFB without a compelling reason since, according to American, no bidder would be prejudiced by allowing both bidders to submit a completed Certificate of Procurement Integrity form after bid opening. In addition, American argues that it is not necessary to cancel the procurement, because the underlying statute requiring the certification only requires that the certificate be completed before award.

The Certificate of Procurement Integrity clause, Federal Acquisition Regulation (FAR) § 52.203-8 (FAC 90-2), which was omitted from the solicitation, implements 41 U.S.C. § 423(e)(1) (Supp. I 1989), a statute that bars agencies from awarding contracts unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the Office of Federal Procurement Policy (OFPP) Act provisions set forth elsewhere in 41 U.S.C. § 423. Although the OFPP Act itself only provides that a federal agency may not award a contract without the certification, see 41 U.S.C. §§ 423(e)(1), (2), the implementing regulations in the FAR specifically require that when agencies use sealed bidding procedures, each bidder must submit a signed certificate with its bid. FAR § 52.203-8(c)(1).

American is correct in its assertion that an agency must have a compelling reason to cancel a solicitation after bid prices have been exposed. See FAR § 14.404-1(a)(1); Nomura Enter. Inc., B-244993; B-245521, Sept. 6, 1991, 91-2 CPD ¶ _____. Nonetheless, we have previously decided that completion of the Certificate of Procurement Integrity concerns a matter of bid responsiveness, and that bidders may not, therefore, be permitted to submit completed Certificates of Procurement Integrity after bid opening. Mid-East Contractors, Inc., B-242435, Mar. 29, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 342.

In fact, we have held that where, as here, a defect in the solicitation prevents bidders from properly complying with the procurement integrity certification requirement at the time of bid opening--for example, where the actual certificate lacks the requisite blanks or lines for

¹The Army has since issued a new solicitation for the Tarrytown dredging project. The new IFB contains both the Certificate of Procurement Integrity clause and the certificate form, as well as a modified scope of work.

signature or for the mandatory certification data--the solicitation must be canceled and resolicited. See Shifa Servs., Inc., B-242686, May 20, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 483; Nomura Enter. Inc., supra; Krielow Bros., Inc.; King Fisher Marine Svc., Inc., B-243384; B-243384.2, June 21, 1991, 91-1 CPD ¶ 591.

We also disagree with American's contention that no bidder would be prejudiced by now permitting submission of signed certificates. Permitting bidders to decide after bid opening whether to comply with a material legal obligation would prejudice the integrity of the competitive bidding system by giving an otherwise successful bidder a second opportunity to walk away from a low bid. See 38 Comp. Gen. 532 (1959). In addition, there is no authority to permit the low bidder under a properly canceled IFB an exclusive opportunity to meet the revised requirements of the agency without resolicitation. See John C. Kohler Co., B-218133, Apr. 22, 1985, 85-1 CPD ¶ 460; General Aero Prod. Corp., B-213541, Sept. 18, 1984, 84-2 CPD ¶ 310.²

Next, American implies that the FAR--in requiring that each bidder's signed procurement integrity certificate must be submitted at the time of bid opening³--has expanded the requirements set forth in the OFPP Act, and that those requirements should not be followed here. However, not only have our decisions upheld the requirements in the FAR, see Mid-East Contractors, Inc., supra, but a recent Claims Court case has expressly rejected the contention that the regulatory requirement for completed procurement integrity certifications at the time of bid opening exceeds the scope of the statute. McMaster Constr., Inc. v. United States, Cl. Ct. No. 91-1269C, slip op. (Aug. 5, 1991). Since we agree with the rationale of the Claims Court, we will not consider this matter further.

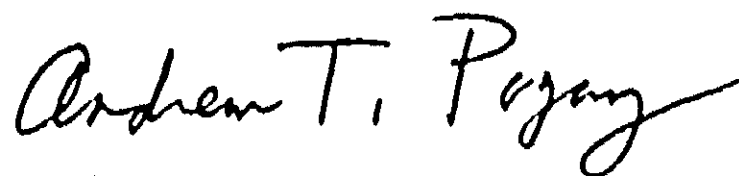
Finally, American argues that our decision in Harsco Corp., B-236777, Dec. 13, 1989, 89-2 CPD ¶ 551, provides authority

²American also argues that the omitted FAR procurement integrity clause could have been incorporated into the original IFB by operation of law under the "Christian Doctrine." See G.L. Christian & Assoc. v. United States, 312 F.2d 424 (Cl. Ct. 1963). We find this argument without merit since the Christian Doctrine cannot be invoked to incorporate clauses into solicitations before award. Rainbow Roofing, Inc., 63 Comp. Gen. 452 (1984), 84-1 CPD ¶ 676.

³See FAR §§ 3.104-9(b)(3); 3.104-10; 14.404-2(m); 52.203-8(c)(1).

for amending rather than canceling the defective IFB here. In Harsco, we upheld a procuring agency's decision to permit the low bidder to correct its bid after bid opening since, after the protested IFB was issued, the statutory requirement for the Certificate was suspended and therefore bidders were no longer required to furnish the procurement integrity certification with their bids. Since that decision, however, the OFPP Act provisions requiring the certification were reinstated and became effective, for the second time, on December 1, 1990. Accordingly, our holding in Harsco is no longer applicable since bidders are once again under an affirmative obligation to provide a procurement integrity certification where the amount of contract award is anticipated to exceed \$100,000.

The protest is dismissed.



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